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Ado Machida
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Dear Mr. Machida:

Throughout his campaign, President-elect Donald Trump made it clear that his priorities are to restore prosperity and create jobs in order to "Make America Great Again." In keeping with those priorities, the new administration should immediately repeal two new rules promulgated under the purported authority of the Endangered Species Act by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service and challenged in court by a coalition of States—the "Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat" rule[1] and the "Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat" rule.[2] We strongly urge President-elect Trump's administration to prioritize its response to these unlawful and expensive Rules.

The Endangered Species Act is important but also costly. As one means of protecting endangered species, the Act authorizes the designation of specific lands as "critical habitats." Once an area is designated as a critical habitat, federal agencies must consult with the Services to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2). A designation under the Act has a significant impact on private landowners and their property rights. States must also comply with the Act when undertaking their own construction projects and when issuing permits for the use of certain pesticides and herbicides, including monitoring the use of these chemicals to ensure they do not destroy critical habitat.

Critical habitat designations, by their very nature, limit human activity. That limitation almost always results in a lost economic opportunity. The impact ripples through the economy; in an average industry, every billion dollars in regulatory costs results in a loss of over 8,000

[1] This rule revised portions of 50 C.F.R. § 424 and is available at 81 Fed. Reg. 7413–40 (Feb. 11, 2016).
[2] This rule revised 50 C.F.R. § 402.02 and is available at 81 Fed. Reg. 7214–26 (Feb. 11, 2016).

jobs.[3] As a consequence, States also suffer a subsequent loss of tax revenue, both as a result of reduced employment as well as foreclosed industrial and recreational use of areas designated as critical habitat. For instance, proposals to conserve the sage grouse "could cost up to 31,000 jobs, up to $5.6 billion in annual economic activity and more than $262 million in lost state and local revenue every year . . . ."[4]

These new Rules unlawfully and vastly expanded the authority of the Services to designate areas as critical habitats. The Rules violate the Act because they expand the regulatory definition of "critical habitat" beyond its narrow statutory definition. The Act defines critical habitat as "specific areas within the geographical area occupied by the species at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). And unoccupied areas trigger an additional requirement—the Services must determine that "such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii).

The Rules ignore the limitations on the critical habitat definition in the Act in at least four ways. First, the Rules allow the Services to designate unoccupied areas as essential to conservation, even if designating only occupied areas would result in the recovery of the species. Second, the Rules allow the Services to designate areas as occupied critical habitat, containing the physical and biological features essential to conservation, even when those areas are neither occupied nor contain those features. Third, the Rules allow the Services to designate uninhabited areas as critical habitat for a species, even when that species could not live in that area. And finally, the Rules allow the Services to declare broad, generalized swaths of land and water critical habitat even though the Act requires the Services to identify those specific areas that qualify as critical habitat. This redefinition of "critical habitat" so clearly contradicts the Act that an article published by American Bar Association lauded the goal of this redefinition "[a]s admirable, or as biologically necessary," while criticizing this change as "a bold effort by the Services to eliminate virtually all statutory elements that serve as constraints on the designation of critical habitat and, instead, to award themselves with largely unfettered discretion in exercising their designation authority."[5] The article lamented, "[w]hile the Services seek to invigorate the regulatory concept of critical habitat, this end should be accomplished by legislation, not rulemaking."[6]

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[3] Sam Batkins & Ben Gitis, *The Cumulative Impact of Regulatory Cost Burdens on Employment*, AM. ACTION FORUM (May 8, 2014), https://www.americanactionforum.org/research/the-cumulative-impact-of-regulatory-cost-burdens-on-employment/.

[4] Reid Wilson, *Western States Worry Decision On Bird's Fate Could Cost Billions In Development*, WASH. POST, May 11, 2014, https://www.washingtonpost.com/blogs/govbeat/wp/2014/05/11/western-states-worry-decision-on-birds-fate-could-cost-billions-in-development/.

[5] Steven Quarles et al., *Critical Habitat in Critical Condition: Can Controversial New Rules Revive It?*, 30 NAT. RES. & ENV'T 8, 9–10 (2015).

[6] *Id.*

Similarly, the Rules expand the definition of "adverse modification" beyond that permitted by the Act. The new definition of adverse modification includes alterations in a critical habitat that "preclude or significantly delay development" of physical or biological features. 50 C.F.R. § 402.02. This definition would give the Services power that the Act never contemplated—to consider whether an alteration would adversely modify or destroy features that do not exist at present. Under this definition, the Services could declare desert land as critical habitat for a fish and then prevent the construction of a highway through those desert lands, under the theory that it would prevent the future formation of a stream that might one day support the species.

We encourage the new administration to withdraw these unlawful and expensive Rules and to address the recent litigation challenging their legality. Because the Rules clearly violate the text of the Act, no action by Congress is necessary. First, we urge the new administration to issue an executive order that the Rules are unlawful and the Services cannot enforce them. Second, we urge the new administration to withdraw these Rules, while complying with both the Endangered Species Act and the Administrative Procedure Act, and return to the regulations which have defined the power of the Services to designate an area as a critical habitat since 1984. Third, we urge the new administration to address the current litigation over these Rules. In November, 18 States sued the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, and the current Secretaries of the Interior and Commerce to challenge the Rules.[7] The current administration filed a motion to dismiss the litigation on January 13, 2017. We would be open to pursuing a stay or settlement of this case.

We look forward to working with you to withdraw these unlawful Rules and resolve this litigation promptly.

Sincerely,

Luther Strange
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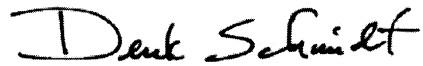
Jahna Lindemuth
Attorney General of Alaska

Leslie Rutledge
Attorney General of Arkansas

Mark Brnovich
Attorney General of Arizona

[7] Alabama *ex rel.* Luther Strange v. Nat'l Marine Fisheries Serv., No. 16-cv-593 (S.D. Ala.).



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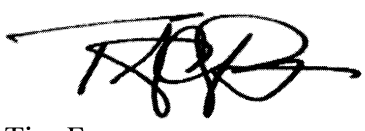

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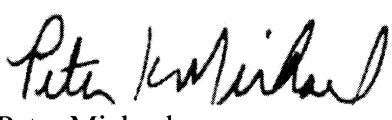

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